

# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Ed Shikada  
Katy Allen  
Richard Doyle

**SUBJECT: DESIGN-BUILD ORDINANCE**

**DATE:** 12-08-04

Council District: Citywide

## **RECOMMENDATION**

Approve an ordinance adding a new Chapter 14.07 to Title 14 of the San José Municipal Code to set forth procedures for implementing the Charter provision exempting from competitive bidding certain “design-build” contracts for the design and construction of public works.

CEQA: Not a project

## **BACKGROUND**

### **1. Adoption of Measure D**

The City Charter requires the City to competitively and publicly bid, and to award to the lowest responsible bidder, each construction contract for a public works project costing more than \$100,000. The Charter expressly exempts certain types of public works contracts from these “bidding and award” requirements. On March 2, 2004, voters passed Measure D, which amended the City Charter to add a new exemption from the “bidding and award” requirements for “design-build” contracts meeting certain requirements.

Measure D defines “design-build” as “a procurement process in which both the design and construction of the project are procured from a single entity.” The exemption for “design-build” contracts applies when the following two conditions exist: (1) the contract for the public works project will cost more than \$5,000,000, and (2) the City Council finds that the “design-build” procurement process would save money or result in faster project completion. Measure D provides that, when these two conditions exist, the City may negotiate and award a “design-build” contract without having to award the contract to the lowest responsible bidder.

### **2. Direction For Implementing Measure D**

Prior to the adoption of Measure D, the Mayor issued a memorandum to the City Council, dated December 1, 2003, indicating that the selection of a “design-build” contractor under the

proposed Charter amendment would occur pursuant to a competitive process. On March 9, 2004, the City Council directed the City Attorney to draft an ordinance implementing Measure D. Consistent with the previously expressed intent, the City Council directed that the ordinance reflect the current standards and practices for the open and competitive selection of professional services.

The City Council also directed that the ordinance provide for the City Council to approve each request for proposals, the criteria for selecting a contractor, the selection of the contractor with whom the City would negotiate, and the award of the "design-build" contract. The City Council directed that the ordinance include provisions for making public the scores of the criteria against the criteria used to select the contractor. It further directed outreach to stakeholder groups and benchmarking with agencies that use the design-build procurement process.

### **3. Status Report**

In a memorandum dated May 28, 2004 (MBA #49), the Manager provided a status report to the City Council regarding the outreach and benchmarking effort and provided recommendations for some potential candidate projects. The projects were:

- Airline Maintenance Facility
- Aviation North Concourse Baggage System
- Aviation North Concourse Information Technology
- Singleton Sports Park
- Public Safety Driver Training Center
- Fourth Major Interceptor Phase VI (Sewer)

Staff will provide reports on these and other potential candidate projects in a subsequent staff report.

### **ANALYSIS**

The proposed ordinance responds to the City Council's direction and attempts to incorporate much of the input of various stakeholders. At the same time, it seeks to establish a framework for implementing Measure D that will provide maximum flexibility to respond to changing economic needs, to changing demands in the architectural, engineering and construction industries, and to the unique demands and complexities of each individual project.

#### **1. Competitive Request For Proposal Process**

The proposed ordinance requires the City to award a "design-build" contract based on the results of a competitive process in which interested design-build entities submit sealed proposals in response to a request for proposals (RFP). Importantly, it requires the City Council to approve the RFP prior to issuance and to make findings that the Design-Build procurement process is

likely to meet the requirements of Measure D. The following are some of the more material requirements of the RFP.

**a. Project Description**

The proposed ordinance requires the RFP to include preliminary plans, specifications and other documents appropriate to adequately describe the project needs. The RFP must describe the expected cost range of the project, budget constraints and a schedule for the planned commencement and completion of the project. The proposed ordinance also requires the RFP to include a description of the documentation that must be submitted as part of any proposal.

**b. Selection Process And Criteria**

In order to maximize flexibility to respond to the particular needs of each project, the proposed ordinance does not set forth a single, rigid process or set of criteria for the selection of a design-build entity. Rather, it requires each RFP to describe the selection process and the criteria that the City will use to evaluate the proposals. The proposed ordinance requires the selection process described in the RFP to be fair, objective and impartial, and to result in the selection of a design-build entity best meeting the needs of the City.

Examples of selection criteria that might be included in an RFP, subject to City Council approval, might include the proposer's demonstrated ability and proposed plan for the following:

- ❖ Deliver Quality Projects On Time and Within Budget.
- ❖ Innovative methods for project delivery
- ❖ Initial Costs and Life Cycle Costs
- ❖ Comply with all laws, regulations, codes and requirements
- ❖ Provide a safe and harassment free work environment.
- ❖ Comply with all prevailing wage, living wage, affirmative action and contract compliance requirements
- ❖ Promote labor harmony.
- ❖ Positively impact the local economy.
- ❖ Positively assist disadvantaged and small businesses.
- ❖ Effective communications with all stakeholders during all aspects of the project.
- ❖ Mitigate construction impacts on businesses and residents.
- ❖ Demonstrated financial capabilities to carry out the project.
- ❖ Use qualified subcontractors and subconsultants.
- ❖ Complying with all City policies for green and environmentally sustainable buildings.

With regard to the selection process, the proposed ordinance expressly authorizes staff to use a tiered process whereby the pool of proposers is narrowed in a subsequent tier. It also expressly authorizes the use of design competitions in which the City provides a stipend to proposers to defray some or all of the costs associated with the costs of participating in the competition. Staff



believes that for certain projects use of a tiered selection process and/or design competition could be an effective means of selecting a design-build entity.

**c. Labor Peace**

An important part of Measure D is that the design-build procurement process save money or result in faster project completion than if the City used its normal procurement process. Avoiding labor disputes and disruptions is a significant factor in achieving the objectives of delivering a design-build project faster and/or for less money. Accordingly, the proposed ordinance provides that the RFP must require a proposer to include in its proposal a plan for how it will reduce the risk of a labor dispute or unrest will occur during the term of the design-build contract. The design-build contract would then incorporate the details and requirements of the plan for labor peace contained in the proposal.

**d. Multiple Projects**

With regard to project scope, the proposed ordinance would specifically prohibit a project from consisting of the construction of multiple public improvements at different locations. The exception to this general prohibition would be when the City Council finds that the multiple improvements share common design and/or construction characteristics that would be likely to save money or result in faster completion than if the improvements were constructed separately.

**e. Local and Small Business Preference and Other Policies**

In addition to the previously described provisions, the proposed ordinance contains a general requirement that preparation of the RFP be consistent with other City policies applicable to selecting and contracting for professional design and construction services. This would include requirements regarding Prevailing Wage, Construction Impact Mitigation, Prequalification and Partnering/Dispute Resolution.

As part of the RFP, Staff also intends to follow the policy expressed in the Local and Small Business Preference ordinance, which the City Council just adopted in June of this year. The Local and Small Business Preference ordinance applies to obtaining professional services; it does not apply to obtaining construction services that require contracts be let to the lowest responsible bidder. The process of selecting a design-build entity involves a hybrid process of obtaining both professional services and construction services. However, the design-build construction services obtained pursuant to the proposed ordinance would not be subject to the "lowest responsible bidder" requirement. Accordingly, staff intends to apply the Local and Small Business Preference ordinance to the selection of a design-build entity.

A question raised during the development of the proposed ordinance was whether the City could benefit from small and local business preference for design-build contracts over and above the requirements contained in the current ordinance. Staff believes that the Local and Small Business Preference ordinance, as it may be amended from time to time, is appropriate. If

selection is based upon factors other than price, then the Local and Small Business Preference ordinance requires a preference of 5% of the total points for a "local" business and another 5% for a "small" business. If selection is based solely upon price, then the ordinance requires a preference of 2 1/2% of the cost of the bid for a "local" business and another 2 1/2% for a "small" business. Under the current ordinance, no preference is given for the use of local and small subconsultants.

## **2. Contractor Qualifications**

The proposed ordinance requires staff to either prequalify proposers or qualify them as part of the RFP process. The proposed ordinance sets forth certain minimum qualification requirements that must be included in the qualification process. For example, it requires, at a minimum, that a proposer demonstrate that it has the required license, registration and credentials to design and construct the project. It also requires a proposer to identify key supervisory staff that would be assigned to the project, and to demonstrate that these persons have the experience and capability to complete the project. The proposer also must disclose violations of any State or federal laws related to labor, or any previous instances in which the entity failed to complete a public works project or was not awarded a project for reasons involving nonresponsibility.

Any prequalification would have to be conducted consistent with the City's current prequalification policy. That policy, which was approved by the City Council, delegates the responsibility to City staff to conduct the process and to address appeals that are related to prequalification. During development of the proposal, the League of Women Voters suggested that the City Council approve the results of any pre-qualification process. Staff believes the existing prequalification policy is appropriate, especially given that the City Council will have many opportunities to approve other actions related to the selection of a design-build entity.

## **3. Prohibited Conflict**

To maximize the integrity and fairness of the competitive selection process, the proposed ordinance would prohibit any person who substantially participates in the preparation of the RFP from being a part of the Design-Build Entity. This prohibition is aimed primarily at someone like a consultant that might prepare the specifications to be included by the City in the RFP. For this reason, the prohibition expressly does not apply to persons who prepare foundational reports, such as a master plan, soils report or environmental clearance, that is subsequently used by another consultant to prepare the design requirements for the project.

## **4. Prohibited Communications**

Staff recommends that the ordinance prohibit a Design-Build Entity and any persons representing the entity from communicating with anybody other than the person designated in the RFP. This proposed prohibition would apply only to communications regarding the RFP between the time the Council approves the RFP and the time a recommendation was made to the Council regarding the selection of the Design-Build Entity. The prohibition would not apply to a

communication regarding an alleged failure of a City employee to follow the procedures or requirements governing the RFP, or any alleged misconduct or impropriety of a City employee related to the RFP. Staff believes that this prohibition, as limited, will help to maintain the integrity and fairness of the selection process.

## **6. Contract Award**

Under the proposed ordinance, RFPs must be evaluated and ranked using the criteria and selection process set forth in the RFP. It authorizes staff to request additional information as part of the evaluation process. It also authorized staff to reject all the proposals.

The proposed ordinance requires the City Council to authorize staff to negotiate with one or more of the Design-Build Entities and to award a design-build contract. Under the proposed ordinance, the City Council would have final authority to approve a contract with the design-build entity provided the contract amount exceeds \$5,000,000, and the City Council finds that the "design-build" procurement process will save money or result in faster project completion.

The proposed ordinance requires that the cumulative scores of each of the proposers as against the selection criteria be included as part of any recommendation to the Council. It also provides a formal method for proposers to object to a staff recommendation regarding selection of a design-build entity. It requires staff to provide proposers with written notice of the recommendation, including the reasons for the recommendation and the cumulative scores of each of the proposers as against the selection criteria. On or before five (5) working days following the date of the notice of recommendation, a proposer can submit a written statement setting forth any objection and the reason for the objection. The proposed ordinance requires the City to consider the validity of each written objection and to provide all proposers with the written response prior to the City Council meeting.

## **PUBLIC OUTREACH**

City staff began outreach efforts in March 2004, with notifications to the following industry groups: (1) Construction Management Association of America, (2) Silicon Valley Chamber of Commerce, (3) Construction Employers Association, (4) Associated General Contractors, (5) League of Women Voters, (6) American Institute of Architects, (7) Building Trades Council, (8) Consulting Engineers and Land Surveyors of California, (9) Small Business Commission, and (10) Airport Peer Review Panel. In addition, e-mail notifications were sent to all subscribers to the Public Works Bid Hot Line. Subscribers consist of over 400 design and construction professionals, including small and local businesses that may not be active members of the organizations noted above.

A preliminary public meeting was held on April 16<sup>th</sup> in the Council Chambers, to allow for the opportunity to provide input prior to the drafting of the implementation ordinance. Two additional meetings were held in the morning and evening on September 23<sup>rd</sup> to describe the content of the draft ordinance and to obtain feedback on the draft ordinance. Staff has prepared a

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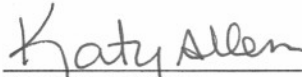
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summary of the comments received at these meetings, along with brief responses to many of the comments received from the earlier meeting, all of which are attached to this memorandum as Attachment A.



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